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No. 88-1054

In The

Supreme Court of the United States

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HAROLD FREEMAN,
Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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SUPPLEMENTAL BRIEF OF PETITIONER

This Supplemental Brief discusses intervening matter affecting consideration of the Petition for a Writ of Certiorari filed December 19, 1988, by the People of the State of California. No brief in opposition was filed by Defendant-Respondent Harold

Freeman. This case is presently calendered for conference discussion by the Court on Friday, February 17, 1989.

Since the filing of the Petition, the People moved the California Supreme Court for recall of its mandate and for a stay. This motion was denied on January 20, 1989. On January 25, 1989, the People filed a motion for stay with the trial court, the Superior Court of Los Angeles County. On January 26, 1989, the People, Petitioner herein, applied to Justice O'Connor as Circuit Justice for an order staying the enforcement of the mandate and staying the trial court from dismissing this case from its docket. On February 1, 1989, Justice O'Connor issued an opinion in connection with the denial of the application. (Copy in Appendix hereto.) On February 3, 1989, the Superior Court of Los Angeles, Department M in Van

Nuys, Judge Alan B. Haber, continued the case on its docket until March 7, 1989, and stated in its Minute Order: "The Court finds that the 60 days to bring defendant to trial began to run from 1-6-89. The Court orders that an order of dismissal shall be entered on 3-7-89 unless this Court is told by the United States Supreme Court not to enter such dismissal."

In her opinion denying the Petitioner's application for stay, Justice O'Connor found that it would be "unlikely that four Justices would vote to grant certiorari" because "the decision of the California Supreme Court rests on an adequate and independent state ground". The opinion of Justice O'Connor noted the interpretation placed by the California Supreme Court on the state pandering for prostitution statute, Penal Code Section 266i, as

requiring sexual contact "for the purpose of sexual arousal or gratification of the customer or of the prostitute", quoting People v. Hill, 103 Cal.App.3d 525, 534-35 (1980). Justice O'Connor found the First Amendment considerations to be confined to the second subsection of the California Supreme Court's decision, regarding the requirement that the state prove and the trial court find the ultimate product to be an "obscene" film as well as proving the new elements of pandering for prostitution. Justice O'Connor stated that a reversal by this Court could be advisory because the California Supreme Court would "still reverse Freeman's conviction on state statutory law grounds".

The People respectfully disagree with this assumption and allege that a reversal by this Court would not result

in the same judgment being rendered by the California Supreme Court after being corrected in its views on the federal issue.

First, this Court should hold that the First Amendment does not require the filmed product to be obscene for prostitution laws to be violated in its making, as was the law prior to the decision below. See: People v. Souter, 125 Cal.App.3d 563, 178 Cal.Rptr. 111 (1981); People v. Kovner, 409 N.Y.S.2d 349 (N.Y. Sup. Ct., 1978); People v. Fixler, 56 Ca.App.3d 321, 128 Cal.Rptr. 363 (1976); United States v. Roeder, 526 F.2d 736 (10th Cir. 1975), cert. den. 426 U.S. 905 (1976).

This holding alone would dramatically change the judgment on remand.

Even if the California Supreme Court adhered to its application of

People v. Hill's pure prostitution arousal factors to hard-core pornographic filming (rather than applying the Souter-Fixler rule of sexual conduct for compensation), the re-trial of this cause would be different only in proving arousal or gratification. Under the present judgment, a retrial must involve proof of arousal or gratification of the actors or the producer during the sex acts and obscenity of the film after the sex acts were made into a movie. This change alone is not the "same judgment" and is an error purely and solely based on an erroneous application of federal law by the California Supreme Court.

Such a ruling by this Court, and such a remand decision by the California Supreme Court, would also greatly change the future course of this important issue since the California General

Assembly would be free to define the elements of pandering in filmmaking without requiring proof of obscenity and even without proof of arousal or gratification (since these were added elements of live prostitution under People v. Hill not required by the First Amendment).

It should also not be assumed that the California Supreme Court would still reverse on the basis of its prior decision on the prostitution elements if this Court reversed. It is not clear from the face of the opinion below that state law compelled the reversal of Freeman's conviction and, therefore, it was not adequate under Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). The California Supreme Court below, in People v. Freeman, 46 Cal.3d 419, 425, 758 P.2d 1128, 1131 (1988), stated that even if it could sustain Freeman's

conduct as pandering, it felt compelled to reverse the conviction because of its strict view of First Amendment application as protecting this conduct. The Court below said it must reverse because "the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would infringe unconstitutionally upon First Amendment values". Ibid.

Since the California Supreme Court felt compelled by federal law to reverse in any event, its view of what elements to apply to pandering were also applied too strictly. But for its view of First Amendment values in the filming content, it could have applied the sex acts for money rule of Souter-Fixler as applied by the Court of Appeals below at 198 Cal.App.3d 292, 233 Cal.Rptr. 510 (1987).

As discussed in the Petitioners' Supplemental Brief of Karen Applegate, et al., filed in Applegate v. Freeman, No. 88-1050, on or about February 13, 1989, the California Supreme Court once before ruled on the elements of pandering in filmmaking in its denial of a hearing to the Court of Appeal decision in People v. Souter, supra. The affirmance of the charges against James Souter, in a case "on all fours" with those against Harold Freeman, involved a limiting construction by the Court of Appeal that was still binding on the Superior Court at the time of Harold Freeman's trial and its rule was applied to affirm the instant conviction. See: People v. Freeman, supra, 198 Cal.App.2d 292, 233 Cal.Rptr. 510, 511 (1987) (copy in appendix to People's Petition.) Although the Court of Appeal below could not cite to

Souter, for the reasons discussed in the Applegates' Supplemental Brief, the rule was the same. Since the People could not cite Souter, or argue its application, before the California Supreme Court in support of Freeman's conviction, it is highly doubtful that the California Supreme Court considered its previous ruling in Souter.

The California Supreme Court may have replaced the Souter-Fixler rule with that of People v. Hill because of its view of First Amendment restrictions on this conduct, but this Court should allow the court below to re-consider the application of Souter-Fixler after correcting its holding. The First Amendment does not require that obscenity be proven in film-pandering cases, nor that arousal be required on the part of the "prostitute" or the "pimp" who produces a hard-core

pornographic film. Relieved of the error that the perceived First Amendment requirement forces the result reached below, the California Supreme Court could abandon its People v. Hill restrictions and re-apply its ruling involved in denying a hearing in Souter.

The Souter case came before the California Supreme Court in 1981-82 on mandatory, not discretionary, review and the elements of People v. Hill (1980) were not applied by the Court below at that time. Not until Freeman in 1988 did the California Supreme Court feel it must decide the case "the way it did because it believed that federal law required it to do so", and therefore its 1988 ruling is not independent of its view of the First Amendment and its decision below does not rest on adequate, nor irreversible, state

grounds under Michigan v. Long, supra at 1041.

CONCLUSION

Since any re-trial, or even a new statute for California, will depend entirely on whether this Court reverses the California Supreme Court's opinion that the First Amendment requires proof of obscenity in pandering-filmmaking cases, the reversal of that requirement will prevent the same judgment from being issued on remand.

This Court should reverse the decision below and hold that neither obscenity nor arousal need be proven where the conduct is procurring explicit sexual acts for hire to make films. The removal of any First Amendment requirement in this regard would allow the courts below to interpret state law without reference to obscenity and would allow the legislature and the courts to

abandon the rule of People v. Hill in filmmaking cases and return to the rulings in People v. Souter and People v. Fixler, supra.

For these reasons, the Petition for a Writ of Certiorari should be granted, and the writ issued to the courts below in order to prevent the Superior Court from dismissing the case from its docket, or ordering that a retrial begin, on March 7, 1989.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. A-602 (88-1054)

CALIFORNIA *v.* HAROLD FREEMAN

ON APPLICATION FOR STAY

[February 1, 1989]

JUSTICE O'CONNOR, Circuit Justice.

The State of California requests that, as Circuit Justice, I stay the enforcement of the judgment of the Supreme Court of California pursuant to 28 U. S. C. § 2101(f) pending the disposition of a petition for certiorari (No. 88-1054) to review that judgment. Because I think it unlikely that four Justices would vote to grant certiorari, see *Hicks* v. *Feiock*, 479 U. S. 1305, 1306 (1986) (in chambers opinion), I deny the application for issuance of a stay.

In its petition for certiorari, California seeks review of the State Supreme Court's judgment reversing the conviction of respondent Freeman for pandering under California Penal Code § 266i. *People* v. *Freeman*, 46 Cal. 3d 419, 758 P. 2d 1128 (1988). Freeman is a producer and director of pornographic films who hired and paid adults to perform sexual acts before his film cameras. In 1983, Freeman was arrested and charged with five counts of pandering based on the hiring of five such performers. He was not charged with violation of any of California's obscenity laws. Freeman was tried before a jury and convicted on all five counts of pandering; the State Court of Appeal affirmed the judgment of conviction. *People* v. *Freeman*, 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1988).

On discretionary review, the California Supreme Court first considered the relevant statutory language of the State Penal Code. In relevant part, § 266i of the Penal Code provides that a person is guilty of felonious pandering if that per-

son "procures another person for the purpose of prostitution . . . ." Prostitution, in turn, is defined in § 647(b) of the Penal Code as "any lewd act between persons for money or other consideration." Finally, "'for a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*'" 46 Cal. 3d, at 424, 758 P. 2d, at 1130 (emphasis in original), quoting *People* v. *Hill*, 103 Cal. App. 3d 525, 534–535, 163 Cal. Rptr. 99, 105 (1980).

Interpreting these definitions of terms relevant to the state pandering statute, the State Supreme Court held that "in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*" 46 Cal. 3d, at 424, 758 P. 2d, at 1131 (emphasis in original). Applying this principle to Freeman, the court characterized the payments made to the performers as "acting fees" and held that "there is no evidence that [Freeman] paid the acting fees for the purposes of sexual arousal or gratification, his own or the actors'." *Id.*, at 424–425, 758 P. 2d, at 1131. Thus, the court held, "[Freeman] did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution." *Ibid.* In the succeeding section of its opinion, the California Supreme Court went on to observe that "even if [Freeman's] conduct could somehow be found to come within the definition of 'prostitution' literally, the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values." *Ibid.*

California, in its petition for certiorari, would have us review this First Amendment holding of the State Supreme Court. I recognize that the State has a strong interest in controlling prostitution within its jurisdiction and, at some

point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed. I do not, however, think it likely that four Justices would vote to grant the petition because in my view this Court lacks jurisdiction to hear the petition. It appears "clear from the face of the [California Supreme Court's] opinion," *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), that its analysis of the pandering provision of the State Penal Code constitutes an adequate and independent state ground of decision. Interpretations of state law by a State's highest court are, of course, binding upon this Court. *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). Here, the California Supreme Court has decided that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under § 266i of the California Penal Code. That is an adequate ground for reversing Freeman's conviction.

As I read the State Supreme Court's opinion, it is independent of federal law as well. This Court has held that, where a state court has "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . . we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide . . . 'suits according to its own local law.'" *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977), quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950). This does not appear to be such a case.

The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled "First Amendment Considerations." The state court's discussion of the language of the Penal Code, which concludes with the clear holding quoted above, is not "interwoven with the federal law."

Michigan v. *Long*, *supra*, at 1040. Discussion of federal law—specifically the First Amendment—is strictly confined to the second subsection and constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid. *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

There is language early in the California Supreme Court's discussion section observing that "the prosecution of [Freeman] under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort." 46 Cal. 3d, at 423, 758 P. 2d, at 1130. Nevertheless, in light of the subsequent clear holding based exclusively on the state pandering statute, as well as the State Supreme Court's doubts in its discussion of the First Amendment whether "[Freeman's] conduct could *somehow* be found to come within the definition of 'prostitution' literally," *id.*, at 425, 758 P. 2d, at 1131 (emphasis added), I conclude that the state court's statutory holding is independent from its discussion of the First Amendment and was not driven by that discussion. Because the decision of the California Supreme Court rests on an adequate and independent state ground, the State of California's application for a stay of enforcement of the judgment of the California Supreme Court is denied.

So ordered.

CERTIFICATE OF SERVICE

Three copies of the foregoing Supplemental Brief of Petitioner were served upon counsel for Defendant-Respondent on this 14th day of February, 1989, by placing them in the U.S. Mail, first-class postage prepaid, addressed to the following:

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All parties required to be served have been served.

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